UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LIAM FELTON, Plaintiff, vs. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	Case No. CV 13-8449-JPR **MEMORANDUM OPINION AND ORDER AFFIRMING COMMISSIONER**

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner's final decision denying his application for Social Security disability insurance benefits ("DIB"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed August 6, 2014, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner's decision is affirmed.

II. BACKGROUND

Plaintiff was born on October 11, 1959. (Administrative Record ("AR") 147.) He completed 11th grade (AR 46), and he worked as a home attendant caring for a paralyzed man and as a janitor at an office (AR 59-61).

On February 28, 2011, Plaintiff submitted an application for DIB, alleging that he had been unable to work since March 31, 2008, because of glaucoma and asthma. (AR 68, 147-48, 168.) After his application was denied, he requested a hearing before an Administrative Law Judge. (AR 82.) A hearing was held on May 23, 2012, at which Plaintiff, who was represented by counsel, testified, as did a vocational expert ("VE"). (AR 42-66.) In a written decision issued June 25, 2012, the ALJ found Plaintiff not disabled. (AR 31-38.) On September 19, 2013, the Appeals Council denied Plaintiff's request for review. (AR 1-5.) This action followed.

III. STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The ALJ's findings and decision should be upheld if they are free of legal error and supported by substantial evidence based on the record as a whole. See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such evidence as a reasonable person might accept as adequate to support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla but less than a preponderance. Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.

Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports a finding, the reviewing court "must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1996). "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Id. at 720-21.

IV. THE EVALUATION OF DISABILITY

People are "disabled" for purposes of receiving Social Security benefits if they are unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted, or is expected to last, for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

A. The Five-Step Evaluation Process

An ALJ follows a five-step sequential evaluation process to assess whether someone is disabled. 20 C.F.R. § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995) (as amended Apr. 9, 1996). In the first step, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity; if so, the claimant is not disabled and the claim must be denied. § 404.1520(a)(4)(i). If the claimant is not engaged in substantial gainful activity, the second step requires the Commissioner to determine whether the claimant has a "severe" impairment or combination of impairments

significantly limiting his ability to do basic work activities; if not, a finding of not disabled is made and the claim must be denied. § 404.1520(a)(4)(ii). If the claimant has a "severe" impairment or combination of impairments, the third step requires the Commissioner to determine whether the impairment or combination of impairments meets or equals an impairment in the Listing of Impairments ("Listing") set forth at 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. § 404.1520(a)(4)(iii).

If the claimant's impairment or combination of impairments does not meet or equal one in the Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient residual functional capacity ("RFC")[1] to perform his past work; if so, he is not disabled and the claim must be denied. § 404.1520(a)(4)(iv). The claimant has the burden of proving he is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets that burden, a prima facie case of disability is established. Id. If that happens or if the claimant has no past relevant work, the Commissioner bears the burden of establishing that the claimant is not disabled because he can perform other substantial gainful work available in the national economy. § 404.1520(a)(4)(v). That determination comprises the fifth and final step in the sequential analysis. § 404.1520; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

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[1] RFC is what a claimant can do despite existing exertional and nonexertional limitations. § 404.1545; see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

B. The ALJ's Application of the Five-Step Process

At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since March 31, 2008, the alleged onset date. (AR 33.) At step two, he concluded that Plaintiff had the severe impairments of "left eye blindness secondary to glaucoma, chronic obstructive pulmonary disease (COPD) and asthma/emphysema." (Id.) At step three, the ALJ determined that Plaintiff's impairments did not meet or equal any of the impairments in the Listing. (AR 34.) At step four, he found that Plaintiff had the RFC to perform light work except that he "must avoid exposure to dust, gases, fumes and other respiratory irritants, work that involves frequent depth perception and peripheral vision, and work with small objects." (Id.) The ALJ concluded that Plaintiff could not perform any of his past relevant work. (AR 36.) Based on the VE's testimony, the ALJ found that Plaintiff could perform the job of advertising-material distributor, which existed in significant numbers in the national economy. (AR 37-38.) Accordingly, he found Plaintiff not disabled. (AR 38.)

V. DISCUSSION

Plaintiff contends that the ALJ erred in (1) assessing his credibility, (2) formulating his RFC, and (3) determining that he could "sustain work activity and perform a significant number of jobs." (J. Stip. at 6.) For the reasons discussed below, remand is not warranted.

A. The ALJ Properly Assessed Plaintiff's Credibility

Plaintiff claims that the ALJ "provide[d] no specific and legitimate reasons to discredit [his] testimony as required by

the case law" and "improperly decided [his] RFC before properly evaluating [his] testimony." (J. Stip. at 14.)

1. Relevant background

In a March 31, 2011 Exertion Questionnaire, Plaintiff reported that he had shortness of breath "from [his] lung disease and asthma" and also suffered from high blood pressure and glaucoma. (AR 174.) He could walk about a block before needing to sit down to rest and could walk an hour before he "just can't do it anymore." (Id.) Plaintiff lived alone but his daughter came over to help him wash, cook, clean, and shop. (Id.)

Plaintiff reported that he could not climb stairs or lift and carry anything weighing more than 10 pounds. (AR 175.) He could perform housework for about 45 minutes before he needed to stop "from the shortness of breath an[d] my eye sight." (AR 176.) He said he used a cane "because I can't see when walking and don't want to fall." (Id.)

At the May 23, 2012 hearing, Plaintiff testified that his poor eyesight prevented him from working. (AR 47.) He could not see with his left eye at all and was having problems seeing with his right eye. (Id.) Plaintiff testified that he could not see anything small, could not read unless the print was "really, big, large," and could not tell a fork from a knife unless he felt them. (AR 48-49.) He listened to the television but did not watch it because the image was blurred and he "can't even see it" even if he was sitting only five or six feet away. (AR 55-56.) Plaintiff, who was sitting about six feet from the ALJ at the

hearing,[2] testified that he could clearly see the features of the ALJ's face and could tell whether he was wearing glasses. (AR 47-48, 55.) Plaintiff could bathe himself but could not cut his beard. (AR 50-51.) He used a cane as a visual aid. (AR 54.)

Plaintiff testified that he had asthma or COPD and felt short of breath when he lifted "something too heavy" or walked one block; his shortness of breath was worse when he climbed stairs. (AR 51, 53-54.) He could not lift anything weighing more than 10 pounds. (AR 55.) He did not cook or clean his house and would call someone to help him with those things. (AR 56-57.)

2. Applicable law

An ALJ's assessment of symptom severity and claimant credibility is entitled to "great weight." See Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1986). "[T]he ALJ is not required to believe every allegation of disabling pain, or else disability benefits would be available for the asking, a result plainly contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012) (internal quotation marks omitted).

In evaluating a claimant's subjective symptom testimony, the ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d at 1035-36. "First, the ALJ must determine whether the claimant

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[2] Although the ALJ twice noted at the hearing that he was about six feet from Plaintiff (AR 47, 56), in his written decision he found that he had been sitting "about 10 feet from" him (AR 21).

has presented objective medical evidence of an underlying impairment [that] could reasonably be expected to produce the pain or other symptoms alleged." Id. at 1036 (internal quotation marks omitted). If such objective medical evidence exists, the ALJ may not reject a claimant's testimony "simply because there is no showing that the impairment can reasonably produce the degree of symptom alleged." Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in original).

Second, if the claimant meets the first test, the ALJ may discredit the claimant's subjective symptom testimony only if he makes specific findings that support the conclusion. See Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or affirmative evidence of malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. Lester, 81 F.3d at 834; Ghanim v. Colvin, 763 F.3d 1154, 1163 & n.9 (9th Cir. 2014).

In assessing a claimant's credibility, the ALJ may consider (1) ordinary techniques of credibility evaluation, such as the claimant's reputation for lying, prior inconsistent statements, and other testimony by the claimant that appears less than candid; (2) unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment; (3) the claimant's daily activities; (4) the claimant's work record; and (5) testimony from physicians and third parties. Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); Smolen, 80 F.3d at 1284. If the ALJ's credibility finding is supported by substantial evidence in the record, the reviewing court "may not engage in second-guessing." Thomas, 278 F.3d at 959.

3. Analysis

After summarizing Plaintiff's subjective testimony and the medical evidence (AR 33-36), the ALJ found that Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms" but that his "statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with" his RFC (AR 36). As discussed below, the ALJ gave sufficient, clear and convincing reasons for discounting Plaintiff's credibility.

First, the ALJ discounted Plaintiff's credibility based on his inconsistent statements regarding his symptoms. (AR 35.) The ALJ noted that although Plaintiff testified that he was unable to see images on a television that was five or six feet from him (AR 55-56) or distinguish small objects (AR 48), he could "clearly" see the ALJ, who was seated about six feet away during the hearing (AR 47-48, 55-56). (AR 35.) The ALJ also noted that Plaintiff said he used a cane because he didn't want to fall (AR 54, 176), but none of the examining or treating physicians had noted that he used an assistive device (see, e.g., AR 250 (examining physician noting that Plaintiff "is able to ambulate without the need for an assistive device"), 268 (treatment note that does not check "Walking Aide" under "Medical Supplies/Equipment" and instead says "NA")). (AR 35); cf. Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) (ALJ properly discounted credibility when claimant "walked slowly and used a cane at the hearing" even though no doctor indicated he used or needed assistive device and two doctors noted he did not

need one). The ALJ was entitled to rely on such inconsistencies in discounting Plaintiff's credibility. See Smolen, 80 F.3d at 1284 (in assessing credibility, ALJ may consider "ordinary techniques of credibility evaluation," such as prior inconsistent statements and "other testimony by the claimant that appears less than candid").

The ALJ also noted inconsistencies in Plaintiff's reports of how many cigarettes he smoked. (AR 36.) Indeed, in November 2009, Plaintiff reported smoking a quarter of a pack of cigarettes a day (AR 238); in March 2010, he reported smoking one pack a day (AR 232); in January 2011, he reported that he "quit smoking 2 weeks ago" and had smoked a half a pack of cigarettes a day for 37 years (AR 316); in June 2011, he reported smoking one cigarette a day and having smoked one pack a day for 40 years (AR 246); and in October 2011, he reported smoking one cigarette a day (AR 323). Plaintiff contends that the ALJ should not have relied on this inconsistency to discount his credibility because it reflects only that he succeeded in cutting down his smoking. (J. Stip. at 13.) But even if the ALJ erred by relying on this inconsistency, it was harmless because his credibility determination was supported by other clear and convincing reasons. See Carmickle v. Comm'r Soc. Sec. Admin., 533 F.3d 1155, 1163 (9th Cir. 2008) (ALJ's errors harmless when they did not "negate the validity" of adverse credibility determination (internal quotation marks omitted)).

The ALJ also permissibly discounted Plaintiff's subjective complaints because they were inconsistent with the medical evidence. Plaintiff complained that he was unable to distinguish

the denomination of coins or bills or make out the images on television, but most of his eye examinations, including those conducted by his treating physician, Dr. Miguel Unzueta, showed almost normal vision of 20/30 in the right eye. (AR 35; see, e.g., AR 309, 241, 276-77, 281.)[3] The ALJ further found that Plaintiff's asserted vision limitations conflicted with Dr. Unzueta's finding that Plaintiff could perform work involving "frequent[]" near and far visual acuity.[4] (AR 35; see also AR 310.) Moreover, regarding Plaintiff's eyesight, examining physician Soheila Benrazavi opined only that if Plaintiff's left-eye vision was "very poor," then "occupations and activities that require binocular vision or intact depth perception are limited" (AR 251), which was inconsistent with Plaintiff's claims that he was unable to see anything small, could not make out a television image, and could not see well enough to tell a knife from a fork.

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[3] The ALJ appears to have made a harmless typographical error by stating in his decision that various eye examinations showed Plaintiff's vision to be "30/20" rather than 20/30. (AR 33-35); see Vision acuity test, MedlinePlus, http://www.nlm.nih.gov/medlineplus/ency/article/003396.htm (last updated Feb. 7, 2013) (vision acuity expressed as fraction with top number indicating distance from chart and bottom number indicating distance at which person with normal eyesight could read same line on chart). The ALJ correctly noted that Plaintiff's right-eye vision was "almost normal" or "near normal." (AR 34-35); see Vision acuity test, MedlinePlus, http://www.nlm.nih.gov/medlineplus/ency/article/003396.htm (20/20 vision is normal).

[4] Plaintiff erroneously states that Dr. Unzueta found that he "could only occasionally perform work activities due to field of vision of the right eye." (J. Stip. at 12.) Dr. Unzueta in fact found that Plaintiff could only "occasionally" perform work activities involving "field of vision." (AR 310.) The ALJ accommodated that finding in the RFC by precluding Plaintiff from performing jobs involving frequent depth perception and peripheral vision. (AR 34.)

Such conflicts with the medical evidence are permissible reasons for discounting Plaintiff's credibility. See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of medical evidence cannot form the sole basis for discounting pain testimony, it is a factor that the ALJ can consider in his credibility analysis."); Carmickle, 533 F.3d at 1161 ("Contradiction with the medical record is a sufficient basis for rejecting the claimant's subjective testimony."); Lingenfelter, 504 F.3d at 1040 (in determining credibility, ALJ may consider "whether the alleged symptoms are consistent with the medical evidence"). In any event, even if the ALJ erred by discrediting Plaintiff's alleged inability to distinguish bills or read, it was harmless because as discussed in Section C, the VE testified that Plaintiff could perform the job of advertising-material distributor even with those limitations. (AR 62-65); see Stout v. Comm'r of Soc. Sec., 454 F.3d 1050, 1055 (9th Cir. 2006) (error harmless when inconsequential to ultimate disability determination).

The ALJ also noted that although Plaintiff alleged that he suffered from debilitating breathing problems, the record showed that he sometimes failed to follow his prescribed treatment. (AR 36.) Indeed, in January 2011, a treating doctor found that Plaintiff's asthma – which had been "well controlled" since high school and began worsening after Plaintiff had suffered a cold two months earlier – was "undercontrolled with current medication," and he prescribed new medication. (AR 316-17.) But at Plaintiff's next visit, in March 2011, the doctor noted that he had not been using his new medications as prescribed. (AR

320.) In May 2011, the doctor noted that Plaintiff's "symptoms had gotten better since last visit with use of inhaler" (AR 321), although he apparently still was not taking his full dose of medication (see AR 322). In October 2011, Plaintiff complained that his lung disease had worsened (AR 323), and the doctor again noted that Plaintiff was not taking his medication as directed (AR 324). Such failure to follow prescribed treatment undermines the credibility of Plaintiff's complaints. See Smolen, 80 F.3d at 1284 (in assessing credibility, ALJ may consider "unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment").

Plaintiff argues that the ALJ relied on "meaningless boilerplate" by stating in his decision that Plaintiff's statements "concerning the intensity, persistence and limiting effects of [his] symptoms are not credible to the extent they are inconsistent with" the RFC assessment. (J. Stip. at 7.) Plaintiff further argues that in so finding, the ALJ "puts the cart before the horse in determining [Plaintiff's] credibility" by "reject[ing] portions of [his] testimony and statements which did not comport with the already constructed RFC assessment." (J. Stip. at 7-8.) Plaintiff relies on Kilbourne v. Comm'r of Soc. Sec., Civil No. 09-6367-HA, 2011 WL 1357330 (D. Or. Apr. 11, 2011), which reversed an ALJ's credibility assessment in part because "the ALJ's reliance upon the perceived inconsistency between [plaintiff's] testimony and the RFC . . . is error." Id. at *4. In Kilbourne, however, the ALJ failed to provide any other appropriate reasons for discounting the plaintiff's credibility. See id. Here, by contrast, the ALJ summarized and

considered Plaintiff's testimony and the medical evidence and provided clear and convincing reasons for discounting his credibility. As such, even if the boilerplate used by the ALJ did discredit Plaintiff's complaints simply because they were inconsistent with the RFC, it was harmless and not grounds for remand. See Tipton v. Colvin, No. 1:13-CV-00359-REB, 2014 WL 4773964, at *6 & n.5 (D. Idaho Sept. 24, 2014) (finding, in case using nearly identical boilerplate language, that "though the use of such common boilerplate language runs the risk of 'getting things backwards,' its mere use is not cause for remand if the ALJ's conclusion is followed by sufficient reasoning").

Plaintiff also contends that the ALJ erroneously "only mentioned Glaucoma in the blind eye" even though Plaintiff "has glaucoma in both eyes." (J. Stip. at 9-10.) But nothing indicates that the ALJ believed Plaintiff's glaucoma was limited to the left eye; rather, he repeatedly refers to Plaintiff's glaucoma and discusses the condition of both eyes. (See AR 33-36.) He simply found that Plaintiff's right-eye glaucoma was not a severe impairment.

In sum, the ALJ provided clear and convincing reasons for discrediting Plaintiff's subjective complaints. Because those findings were supported by substantial evidence, this Court may not engage in second-guessing. See Thomas, 278 F.3d at 959. Plaintiff is not entitled to remand on this ground.

B. The ALJ Properly Formulated Plaintiff's RFC

Plaintiff contends that in formulating his RFC, the ALJ "failed to adequately consider the full scope of [his] problems with vision with his remaining good eye and failed to properly

consider the extent of [his] breathing difficulties and limitations." (J. Stip. at 20.)

1. Relevant background

On June 24, 2011, Dr. Benrazavi, who was board certified in internal medicine, performed an internal-medicine evaluation of Plaintiff at the agency's request. (AR 246-51.) Dr. Benrazavi found that Plaintiff's left eye was "lazy," his left retina was not visualized, and a "black spot" was in "the front of the left eye." (AR 248.) Examination of Plaintiff's right eye was normal, and his "visual fields" were also "grossly normal." (Id.) A lung examination revealed reduced breath sounds but was otherwise normal (id.), and pulmonary function tests showed "moderate obstruction" (AR 250, 252-53).[5] Dr. Benrazavi opined that because of Plaintiff's COPD, he was limited to lifting and carrying 20 pounds occasionally and 10 pounds frequently; standing and walking six hours in an eight-hour day; sitting for six hours in an eight-hour day; and working in an environment that was "reasonably free of dust, fumes and smoke." (AR 251.) She recommended a "review of [Plaintiff's] ophthalmological records" to "ascertain the cause of his eye condition and obtain his true visual acuity" and opined that "[i]f it turns out that the left eye vision is very poor then occupations and activities that require binocular vison or intact depth perception are

[5] "Pulmonary function tests are a group of tests that measure how well the lungs take in and release air and how well they move gases such as oxygen from the atmosphere into the body's circulation." Pulmonary function tests, MedlinePlus, http://www.nlm.nih.gov/medlineplus/ency/article/003853.htm (last updated Dec. 3, 2013).

limited." (Id.) A vision test conducted that day showed that Plaintiff had 20/70 vision in the right eye and 20/200 vision in the left. (AR 258.)

On July 5, 2011, Dr. L.C. Chiang reviewed Plaintiff's medical records and opined that Plaintiff could lift and carry 20 pounds occasionally and 10 pounds frequently and stand and walk for six hours in an eight-hour workday. (AR 72.) He noted that Plaintiff had limited near and far acuity and depth perception but unlimited field of vision; he opined that he should "[a]void jobs requiring good vision and binocular vision." (AR 73.) Dr. Chiang believed that Plaintiff must avoid concentrated exposure to extreme heat and cold, wetness, humidity, fumes, odors, dust, gases, poor ventilation, and hazards. (AR 73-74.)

On November 9, 2011, treating physician Unzueta completed a "Vision Impairment Residual Functional Capacity Questionnaire." (AR 309-11.) He listed Plaintiff's diagnoses as ocular hypertension and left-eye amblyopia.[6] (AR 309.) He stated that Plaintiff was "legally blind" in his left eye, had 20/30 vision after best correction in his right eye, and had "grossly normal"

[6] Amblyopia, also called "lazy eye," is the loss of the ability to see clearly through one eye. Amblyopia, MedlinePlus, http://www.nlm.nih.gov/medlineplus/ency/article/001014.htm (last updated Sept. 2, 2014). Dr. Unzueta wrote "OS" after amblyopia, indicating that it existed in the left eye. (AR 309); see Stedman's Medical Dictionary 1278 (27th ed. 2000) ("O.S." is abbreviation for "oculus sinister," meaning left eye). It is not clear whether he wrote "OS" or "OD," indicating the right eye, after "ocular hypertension." (See AR 309); see also Stedman's Medical Dictionary 1252 (27th ed. 2000) ("O.D." is abbreviation for "oculus dexter," meaning right eye).

peripheral visual fields in the right eye.[7] (Id.) Dr. Unzueta believed that Plaintiff's condition was "stable" and listed his symptoms as "legally blind" in the left eye. (Id.)

Dr. Unzueta opined that Plaintiff could frequently perform work activities involving "near acuity," "far acuity," "accommodation,"[8] and "color vision"; occasionally perform work activities involving "field of vision"; and rarely perform work activities involving depth perception.[9] (Id.) Plaintiff was capable of avoiding ordinary hazards in the workplace, "such as boxes on the floor, doors ajar, [and] approaching people or vehicles." (Id.) Plaintiff had no difficulty walking up or down stairs. (Id.) He could work with large objects but could not "work with small objects such as those involved in doing sedentary work." (Id.) Plaintiff's symptoms would "occasionally" interfere with the attention and concentration needed to perform simple work tasks, but he would not need to take unscheduled breaks during the workday. (AR 311.)[10]

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[7] Dr. Unzueta wrote that Plaintiff's peripheral vision fields "OD," or in the right eye, were grossly normal. (AR 309.) Dr. Unzueta's findings regarding Plaintiff's peripheral vision fields of the left eye are illegible, but they were presumably limited given that Plaintiff is apparently legally blind in that eye. (See id.)

[8] Accommodation is the process by which the eye focuses the image of an object on the retina. Stedman's Medical Dictionary 9 (27th ed. 2000).

[9] The form defined "rarely" as one to five percent of the workday, "occasionally" as six to 33 percent of the workday, and "frequently" as 34 to 66 percent of a workday. (AR 310.)

[10] Plaintiff states that "Dr. Janae D. Vickers" reported that Plaintiff was temporarily disabled for the purposes of

2. Applicable law

A district court must uphold an ALJ's RFC assessment when the ALJ has applied the proper legal standard and substantial evidence in the record as a whole supports the decision. Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005). The ALJ must consider all the medical evidence in the record and "explain in [his] decision the weight given to . . . [the] opinions from treating sources, nontreating sources, and other nonexamining sources." § 404.1527(e)(2)(ii); see also § 404.1545(a)(1) ("We will assess your residual functional capacity based on all the relevant evidence in your case record."); SSR 96-8p, 1996 WL 374184, at *2 (July 2, 1996) (same). In making an RFC determination, the ALJ may consider those limitations for which there is support in the record and need not consider properly rejected evidence or subjective complaints. See Bayliss, 427 F.3d at 1217 (upholding ALJ's RFC determination because "the ALJ took into account those limitations for which there was record

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county general relief benefits (J. Stip. at 4 (citing AR 312)), but in fact Vickers is a physician's assistant and her opinion was therefore entitled to less deference than that of a physician. (See AR 312 (indicating "PA" after Vickers's name)); § 404.1513(a), (d); Molina, 674 F.3d at 1111 (under agency regulations, "only licensed physicians and certain other qualified specialists are considered acceptable medical sources"; "[p]hysician's assistants are defined as 'other sources,' and are not entitled to the same deference" (alteration, citation, and internal quotation marks omitted)). In any event, Vickers's conclusory statement that Plaintiff would be disabled for three months was unsupported by any medical findings and fails to show that Plaintiff should be found disabled for purposes of Social Security benefits. See 42 U.S.C. § 423(d)(1)(A) (disabling impairment must "be expected to result in death or . . . has lasted or can be expected to last for a continuous period of not less than 12 months"); Drouin, 966 F.2d at 1257 (same).

support that did not depend on [claimant's] subjective complaints"); Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1197 (9th Cir. 2004) (ALJ not required to incorporate into RFC any findings from treating-physician opinions that were "permissibly discounted"). The Court must consider the ALJ's decision in the context of "the entire record as a whole," and if the "evidence is susceptible to more than one rational interpretation, the ALJ's decision should be upheld." Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008) (internal quotation marks omitted).

3. Analysis

The ALJ found that Plaintiff retained an RFC for light work that did not involve exposure to dust, gases, fumes, and other respiratory irritants; frequent depth perception or peripheral vision; or working with small objects. (AR 34.) In doing so, the ALJ accurately summarized the medical evidence and accorded "great weight" to the medical opinions from treating physician Unzueta, examining physician Benrazavi, and nonexamining physician Chiang, which comprised all of the medical-opinion evidence in the record. (See AR 36.) Those opinions constitute substantial evidence in support of the ALJ's RFC assessment. See Young v. Comm'r of Soc. Sec., __ F. App'x __, 2014 WL 6845867, at *1 (9th Cir. Dec. 5, 2014) (RFC supported by substantial evidence in part because it was consistent with opinions of examining and consulting medical sources); Larsen v. Comm'r Soc. Sec. Admin., 585 F. App'x 484, 485 (9th Cir. 2014) (substantial evidence supported RFC when doctors' opinions "supported the ALJ's determination").

Plaintiff does not appear to challenge the ALJ's reliance on those medical opinions or argue that the ALJ failed to properly translate them into an RFC. Instead, he summarizes several medical records and summarily contends that his "medical condition as set forth in the treating records does not coincide with an RFC finding for Light Work." (See J. Stip. 26; see also id. at 23-26.) None of the cited evidence, however, establishes that the ALJ's RFC assessment was erroneous. For example, Plaintiff summarizes Dr. Benrazavi's clinical findings but ignores that she concluded, based on those findings, that Plaintiff could perform work activities that are fully consistent with his RFC. (See J. Stip. at 24; AR 246-51.) Plaintiff also points to a January 2011 emergency-room note reflecting Plaintiff's complaints of increased breathing problems when walking more than two blocks or climbing stairs. (J. Stip. at 24-25.) But that note also reflects that "[s]ince his high school [Plaintiff's] asthma has been controlled" and it had worsened only in the preceding two months, after Plaintiff suffered from a cold; Plaintiff's examination that day was noted as "completely normal."[11] (AR 316-17.) Plaintiff also points to an October 2011 pulmonary-function-test report showing findings consistent with "moderate to severe obstruction" and no significant response to a bronchodilator (J. Stip. at 25-26; AR

[11] Plaintiff states that this record was dated November 15, 2010. (See J. Stip. at 24-25 (citing AR 316-17).) But it appears that was the date of a previous hospital admission for treatment of a "fistula," and the date of the treatment note was actually January 26, 2011. (See AR 316-18 (showing "11/15/2010" as "admit" date and "1/26/2011" next to treating physician's name).)

333), but no doctor opined that those findings would result in limitations greater than those reflected in Plaintiff's RFC. At most, the records cited by Plaintiff establish that the medical evidence could have been susceptible to more than one rational interpretation, which is insufficient to warrant reversal of the Commissioner's decision. See Molina, 674 F.3d at 1111 ("Even when the evidence is susceptible to more than one rational interpretation, we must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record."); Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008) (ALJ is "final arbiter with respect to resolving ambiguities in the medical evidence").[12]

Plaintiff's other arguments are equally unavailing. Plaintiff appears to contend that the ALJ should have included additional limitations in his RFC based on his subjective

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[12] Plaintiff notes in his summary of the evidence that Dr. Unzueta found that Plaintiff's symptoms would "occasionally" be severe enough to interfere with attention and concentration needed to perform simple work. (see J. Stip. at 26 (summarizing Dr. Unzueta's findings at AR 309-11).) But the only symptom listed on the form was that Plaintiff was "legally blind" in the left eye (AR 309), and it is unclear how that symptom would interfere with Plaintiff's attention and concentration given the vision limitations outlined in his RFC. Dr. Unzueta also opined that Plaintiff could only "rarely" perform activities involving depth perception (AR 310), while the RFC assessment precluded only work requiring "frequent" depth perception (AR 34). Any error was harmless, however, because as discussed in Section C, the ALJ's hypothetical to the VE included a limitation to "[n]o work that involved depth perception" (AR 62), and the VE testified that a person with such limitation could still perform other work (AR 64). See Stout, 454 F.3d at 1055 (error harmless when inconsequential to ultimate nondisability determination).

complaints (see J. Stip. at 20, 26-28), but as discussed in Section A, the ALJ properly discredited much of Plaintiff's testimony. The ALJ was not required to consider Plaintiff's discredited allegations in formulating Plaintiff's RFC. See Bayliss, 427 F.3d at 1217.

To the extent Plaintiff contends that he is precluded from performing light work based on Social Security Ruling 83-14, 1983 WL 31254 (Jan. 1, 1983) (see J. Stip. at 21), that argument also fails. The cited portion of Ruling 83-14 merely states that when a person has a visual impairment that causes him to be a hazard to himself or others – such as by tripping over boxes while walking, failing to detect approaching people or objects, or having difficulty walking up and down stairs – the ALJ may need to elicit VE testimony rather than relying on the Medical-Vocational Guidelines at 20 C.F.R. part 404, subpart P, appendix 2. See 1983 WL 31254 at *4-6; see also Angulo v. Colvin, 577 F. App'x 686, 687 (9th Cir. 2014) ("A vocational expert is only required when there are 'significant and sufficiently severe non-exertional limitations not accounted for in the grid.'"). Here, however, Plaintiff's own treating physician opined that Plaintiff was "capable of avoiding ordinary hazards in the workplace, such as boxes on the floor, doors ajar, [and] approaching people or vehicles." (AR 310.) And in any event, as discussed below in Section C, the ALJ properly relied on the testimony of a VE, not the Medical-Vocational Guidelines, to find that Plaintiff could perform a significant number of jobs.

Because the ALJ applied the proper legal standard and

substantial evidence supports his RFC finding, remand is not warranted on this ground.

C. The ALJ Properly Determined that Plaintiff Could Perform a Significant Number of Jobs

Plaintiff asserts that the ALJ's finding that he could perform a significant number of jobs was not "proper" or "based on substantial evidence." (J. Stip. at 28.) Specifically, Plaintiff contends that the ALJ's hypothetical to the VE "did not encompass the nature and extent of [his] COPD, emphysema and asthma" or his vision problems. (Id. at 29.) In so arguing, Plaintiff summarizes many of the medical records he relied on in arguing that the ALJ erroneously assessed his RFC and repeats his argument that the ALJ erroneously discounted his credibility. (See id. at 29-31.) Plaintiff further contends that the ALJ erred by "independently determin[ing] that [Plaintiff] could perform the work of Cashier I, without the input of the vocational expert." (Id. at 31.)

1. Relevant background

At the hearing, the ALJ asked the VE to

> [a]ssum[e] a hypothetical claimant with the same vocational and educational background as [Plaintiff] with the following limitations. This person could lift and carry 20 pounds occasionally, 10 pounds frequently, stand and walk up to six – at least six out of eight hours, sit – no limitations on sitting.
>
> Can engage in postural activities on a frequent basis. This person . . . should avoid dust, fumes, gasses [sic] and other lung irritants. This person is

> blind in one eye, the left eye, so he would have no depth perception. No work that involved depth perception. No worth [sic] that required binocular vision or – or a full range of field of vision.
>
> This person can only work with large objects. In his good eye, his vision is limited, so he cannot see small objects. So, for example, he has trouble distinguishing – sitting on a table, he would have trouble distinguishing a knife and a fork and a spoon. He has to do it by feel. He can see large objects that are nearby. But – so, no work that involved any fine vision – close up or any vision at . . . anything more than, say, five, six feet away.

(AR 62-63.) In response to the VE's question, Plaintiff testified that he could not see well enough to distinguish among $5, $10, and $20 bills. (AR 63-64.) Based on that testimony, the ALJ added that the hypothetical person would be unable to tell the difference between denominations of paper money and could not read or write. (AR 64.) The VE testified that she would be "hard pressed" to identify suitable jobs "because of the lifting and the vision part," but she opined that such a hypothetical person could perform the job of advertising-material distributor, which involved handing out printed material and did not require the ability to read. (Id.) The VE testified that approximately 1000 such jobs existed regionally and 53,000 nationally. (AR 65.)

In his decision, the ALJ specifically discredited Plaintiff's testimony regarding his inability to distinguish

coins or paper money, read, or write. (AR 35-37.) The ALJ concluded that Plaintiff could perform light work except that he "must avoid exposure to dust, gases, fumes and other respiratory irritants, work that involves frequent depth perception and peripheral vision, and work with small objects." (AR 34.) He noted that the VE "testified that given all of these factors the individual would be able to perform the requirements of representative occupations such as advertising material distributor," which existed in numbers "sufficient to be significant."[13] (AR 37.) The ALJ further observed,

> [W]hile the VE could not come up with additional job classifications, this was premised on the hypothetical limitation that [Plaintiff] could not work with "small objects" such as money because he could not distinguish the features of the coins or bills, a limitation I find not credible. I would note that other types of jobs, such as cashier II (DOT 211.462-010), which requires frequent near acuity, and has no environmental restrictions, would also possible [sic] with the above RFC.

(AR 37.) The ALJ concluded that "[b]ased on the testimony of the vocational expert, . . . [Plaintiff] is capable of making a successful adjustment to other work that exists in significant

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[13] The ALJ erroneously stated that the VE testified that 153,000 advertising-material-distributor jobs existed nationally, rather than 53,000. (Compare AR 37 with AR 65.) Plaintiff has not relied on that error in challenging the ALJ's decision. In any event, it was harmless because as discussed below, 53,000 national jobs is a significant number. See Stout, 454 F.3d at 1055.

numbers in the national economy." (AR 38.) He therefore concluded that Plaintiff was not disabled. (Id.)

2. Analysis

To the extent Plaintiff challenges the ALJ's determination that he could perform other work because it was allegedly based on improper credibility and RFC findings, that argument fails. As discussed above in Sections A and B, the ALJ's credibility determination and RFC assessment were proper and supported by substantial evidence. The ALJ properly posed a hypothetical to the VE containing all the limitations he found credible based on the evidence of record (as well as additional limitations that he later determined were not credible); in response, the VE testified that Plaintiff could perform the job of advertising-material distributor. (AR 62-64.) The ALJ was entitled to rely on the VE's testimony. See Bayliss, 427 F.3d at 1217 (holding that because "[t]he hypothetical that the ALJ posed to the VE contained all of the limitations that the ALJ found credible and supported by substantial evidence in the record," ALJ's "reliance on testimony the VE gave in response to the hypothetical therefore was proper").

The ALJ was also entitled to rely on the VE's testimony to find Plaintiff not disabled because the advertising-material-distributor job existed in "significant numbers" in the regional or national economy. The Social Security Act states that a claimant who cannot do his previous work will not be found disabled if he can "engage in any other kind of substantial gainful work which exists in the national economy." See 42 U.S.C. § 1382c(a)(3)(B). The Act defines "[w]ork which exists in

significant numbers in the national economy" as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." Id.; see also Gutierrez v. Comm'r of Soc. Sec., 740 F.3d 519, 528 (9th Cir. 2014) (noting that "'work which exists in the national economy' can be satisfied by 'work which exists in significant numbers *either* in the region where such individual lives *or* in several regions of the country'" (emphasis in original)); see also 20 C.F.R. § 404.1566(a) ("We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country."). Here, the VE testified that approximately 1000 advertising-material-distributor jobs existed regionally and 53,000 existed nationally. (AR 65.) That is a "significant number" of jobs sufficient to uphold the ALJ's decision. See Gutierrez, 740 F.3d at 529 (finding 25,000 national jobs significant); Yelovich v. Colvin, 532 F. App'x 700, 702 (9th Cir. 2013) (finding 900 regional jobs significant); Thomas, 278 F.3d at 960 (finding 1300 jobs in state significant); Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999) (finding between 1000 and 1500 jobs in local area significant); compare Beltran v. Astrue, 700 F.3d 386, 389-90 (9th Cir. 2012) (as amended) (135 jobs regionally and 1680 jobs nationally insufficient, but noting that "[w]e need not decide what the floor for a 'significant number' of jobs is in order to reach this conclusion").

Plaintiff also argues that the ALJ "inappropriately, alone, found that [Plaintiff] could perform the job of Cashier I." (J. Stip. at 33.) But the ALJ's observation that Plaintiff would

likely be able to perform other jobs given that his RFC was considerably less limited than the hypothetical does not appear to have been incorrect. In any event, the ALJ clearly found that Plaintiff could perform other work "[b]ased on the testimony of the vocational expert," not his own conclusion that Plaintiff could perform additional jobs, such as cashier. (See AR 38.) Indeed, even if the ALJ had erroneously relied on his finding that Plaintiff could perform the cashier job, it was harmless given his proper finding that Plaintiff could perform the advertising-materials-distributor job. See Stout, 454 F.3d at 1055; cf. Yelovich, 532 F. App'x at 702 (ALJ's reliance on VE's incorrect testimony that claimant could perform two occupations harmless when ALJ also relied on VE's accurate testimony that claimant could perform third job). Remand is not warranted on this ground.[14]

VI. CONCLUSION

Consistent with the foregoing, and pursuant to sentence four of 42 U.S.C. § 405(g),[15] IT IS ORDERED that judgment be entered AFFIRMING the decision of the Commissioner, DENYING Plaintiff's

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[14] Plaintiff states that the ALJ "indicated after the [VE] testimony that he could do a bench decision, indicating a favorable decision, but had other hearings and meetings so would make the decision later." (J. Stip. 29.) The ALJ did state that he could "probably" issue a bench decision but closed the hearing without doing so. (See AR 65-66.) Contrary to Plaintiff's contention, however, nothing indicates that such decision would have been in his favor. (See id.)

[15] This sentence provides: "The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."

request for reversal of the Commissioner's decision, and DISMISSING this action with prejudice. IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment on counsel for both parties.

DATED: January 21, 2015

JEAN ROSENBLUTH
U.S. Magistrate Judge